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VIA HAND DELIVERY

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 97-234, GC Docket No. 92-57, GEN Docket No. 90-264

Dear Mr. Caton:

On behalf of Davis Television Duluth, LLC, applicant for a construction permit for a new television broadcast station to operate on Channel 27 at Duluth, Minnesota, Davis Television Topeka, LLC, applicant for a construction permit for Channel 43 at Topeka, Kansas, and Davis Television Wausau, LLC, applicant for a construction permit for Channel 33 at Wausau, Wisconsin, I am transmitting herewith an original and nine copies of their Joint Comments in the above-referenced proceeding.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,



Dennis P. Corbett

DPC:kbs
Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television Fixed)	
Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

To: The Commission

JOINT COMMENTS OF DAVIS TELEVISION DULUTH, LLC ;
DAVIS TELEVISION TOPEKA, LLC; AND DAVIS TELEVISION WAUSAU, LLC

Davis Television Duluth, LLC, applicant for a construction permit for a new television broadcast station to operate on Channel 27 at Duluth, Minnesota, Davis Television Topeka, LLC, applicant for a construction permit for Channel 43 at Topeka, Kansas, and Davis Television Wausau, LLC, applicant for a construction permit for Channel 33 at Wausau, Wisconsin, hereby submit these joint comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding, released November 26, 1997 (the "Notice").

Davis Television Duluth, LLC, Davis Television Topeka, LLC, and Davis Television Wausau, LLC are commonly owned and are hereinafter referred to as "Davis."

I. BACKGROUND

The Notice seeks comment on a wide ranging set of issues, all related to the implementation of a fundamental change in the way in which the Commission awards authorizations for the construction and operation of commercial broadcast and Instructional Television Fixed Service stations. More specifically, the Commission has invited input from affected parties and the general public concerning a change from comparative hearings to auctions in the awarding of such authorizations, consistent with the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) (the "Budget Act"). One aspect of the Notice (§§'s 23-25) is of particular importance to Davis -- whether "singleton" television station construction permit applications (i.e., those where no competing application has been filed with the FCC) submitted on or before an earlier, publicly announced September 20, 1996, filing deadline should be granted immediately or subjected to competing applications and a potential auction in the indefinite future. For the reasons set forth below, Davis strongly believes that such singleton applications should be processed and granted immediately, and not made subject to auction.

In the Notice, the Commission has tentatively concluded that the Budget Act obligates the Commission to treat all mutually exclusive applicants for construction permits for commercial television stations who filed their applications with the Commission before July 1, 1997 (the "July Cut-Off"), as the only parties eligible to bid in competitive bidding proceedings. In addition, the Commission has concluded that under the Budget Act, until February 1, 1998, it

must waive all provisions of its regulations necessary to permit such parties to enter into agreements to procure the removal of conflicts between competing applications. Notice at ¶ 8. While the Commission is affording such opportunities to competing applicant groups who filed their applications before the July Cut-Off, it has proposed to treat other similarly-situated applicants (i.e., singletons) quite differently. That is, the Commission proposes to make distinctions based not on the applicant's fitness or the merits of its application, but based on whether *another party, unrelated to the applicant*, has filed a competing application for the same channel in the same market. The Commission's tentative conclusion is premised essentially on its reading of the legislative history of the Budget Act and, in particular, certain language contained in the relevant Conference Committee report.¹ Davis believes that the Commission's tentative plan is not compelled by the legislative history of the Budget Act and is demonstrably inequitable. Immediate grant of singleton applications would be consistent with precedent and further the clear public interest in the swift delivery of new service to the public.

II. THE LEGISLATIVE HISTORY OF THE BUDGET ACT POSES NO OBSTACLE TO THE IMMEDIATE GRANT OF SINGLETON APPLICATIONS SUBMITTED IN RESPONSE TO THE SEPTEMBER 1996 FILING DEADLINE

The Notice announced the Commission's tentative conclusion that the Budget Act had effectuated a substantial change in longstanding processing policies relating to authorizations for new commercial broadcast stations. The July Cut-Off was treated as a supervening event that eliminated the need for the Commission to solicit competing applications by means of a published

¹ H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 573 (1997) ("Conference Report").

cut-off list, at least where competing applications happened to already be on file with the Commission. See Notice at ¶ 25. However, the Commission cited language in the Conference Report in concluding that no singleton application can be further processed without first soliciting competing applications and subjecting any resulting competing application group to auction, “at least with respect to situations in which the Commission has not yet opened a filing window....” Notice at ¶ 24 (emphasis added).²

Davis believes that the Conference Report language does not apply to the particular unique circumstances under which the three Davis applications were filed. In the context of a prior rulemaking, the Commission mandated that applications for vacant television allotments be submitted by September 20, 1996 (the “September 1996 Filing Deadline”), with the further caveat that allotments not applied for would be deleted and therefore lost forever. Sixth Further Notice of Proposed Rule Making, MM Docket No. 87-268, 11 FCC Rcd 10968 (1996) (“Sixth Further Notice”). Many applicants filed for numerous channels by the September 1996 Filing Deadline. Many of those channels attracted multiple applications; some attracted only one. Davis believes that this publicly announced September 1996 Filing Deadline differentiates the

² The Conference Report language is as follows:

“The conferees recognize that there are instances where a single application for a radio or television station has been filed with the Commission, but that no competing applications have been filed because the Commission has yet to open a filing window. In these instances, the conferees expect that, regardless of whether the application was filed before, on or after July 1, 1997, the Commission will provide an opportunity for competing applications to be filed. Furthermore, if and when competing applications are filed, the Commission shall assign such licenses using the competitive bidding procedures developed under section 309(j) as amended.”

Conference Report at 573-74 (emphasis added).

three Davis singleton applications from those which concerned the Conference Committee and they therefore need not be put on a cut-off list soliciting further applications.

In Davis' view, the September 1996 Filing Deadline itself constituted a "filing window" within the meaning of the Conference Report. Historically, an applicant for a vacant television allotment would first file an application and only then would the Commission publicly announce that initial application's acceptance for filing and open a window for the filing of competing applications. See, e.g., Public Notice, Rept. No. A-141, released January 28, 1988 (Channel 44, Burlington, Vermont). In that quite typical circumstance, the Commission would open the public filing window only upon receipt of the triggering initial application. In the case of the September 1996 Filing Deadline, however, the Commission opened (and closed) a filing window in its Sixth Further Notice, supra, which put all interested parties on notice of the opportunity to file for any vacant allotment.³ In some cases, multiple applications were filed for the vacancy. In others, like Duluth Channel 27, Wausau Channel 33, and Topeka Channel 43, only one application was filed. But in all such cases, the publicly announced window gave all interested parties a fair opportunity to file an application where an allotment was vacant. The Commission, in creating the September 1996 Filing Deadline, gave to all potential applicants a chance to file for an allotment or else risk losing that allotment forever. If only one applicant

³ While the Commission in the Sixth Further Notice tentatively proposed to open a further window for the filing of applications in competition with those filed by the September 1996 Filing Deadline, the Commission need not open that further window in light of the Budget Act. See Note 6 infra as to the Commission's broad rule making powers. Stated simply, one filing window is enough.

applied for a particular channel before that filing window closed, it is not from lack of opportunity.⁴

The critically important factor here is that the lack of competing applications in Wausau, Topeka and Duluth is not due to the fact that the Commission “has yet to open a filing window,” in the words of the Conference Report. The lack of foresight or lack of interest on the part of other potential applicants should not now work a penalty on Davis. The Commission offered ample opportunity for the filing of competing applications for these channels, and only Davis filed. The Commission’s interpretation of the Conference Report is therefore inapplicable under the special circumstances of the September 1996 Filing Deadline, and Davis should be given its rightful opportunity to proceed with its applications, without the substantial delay that will be caused by the potential introduction of additional competitors.⁵

III. BASIC PRINCIPLES OF EQUITY AS WELL AS PRECEDENT DEMAND THAT ALL APPLICATIONS FILED IN RESPONSE TO THE SEPTEMBER 1996 FILING DEADLINE BE TREATED SIMILARLY

Grant of the relief requested herein by Davis would be entirely equitable and fully consistent with the public interest.⁶ Under general equitable principles as well as longstanding

⁴ Elsewhere in the Notice, the Commission states that it will not accept applications during any “auction window” for deleted vacant television channels pursuant to the Sixth Report and Order in MM Docket No. 87-268, FCC 97-115 (April 21, 1997). Notice at n. 36.

⁵ Davis emphasizes that it is seeking limited relief for a limited universe of singleton applications, justified by the specific and unusual circumstances that attended the September 1996 Filing Deadline.

⁶ In the Notice (at ¶¶ 15-16), the Commission explicitly recognizes the importance
(continued...)

judicial precedent, the Commission must treat similarly situated parties similarly. Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). Here, one group of applicants that filed for vacant television allotments by the September 1996 Filing Deadline is not being subjected to additional competing applications, simply because of the happenstance that one or more competing applications was on file by July 1, 1997, while another group of applicants, the singletons, will have to face the possibility of new competitors and an auction. Furthermore, if new competing applications for the singletons are allowed, this singleton group will not be in position to receive the benefit of the 180-day settlement period that the “competing applicant” group has enjoyed under the Budget Act. Both groups of applicants filed applications in response to the publicly announced September 1996 Filing Deadline, and there is no principled distinction between them that should lead to such disparate legal consequences.⁷

Each of Davis’ three applications for construction permits, submitted prior to the Commission’s September 1996 Filing Deadline, did not meet with any competing applications. Equity clearly favors Davis over a class of potentially interested parties who sat idly by while a publicly announced filing window was pulled shut. The Commission should not now open a new

⁶(...continued)

of fairness and equity to its deliberations in this matter.

⁷ The Notice recites the Commission’s “broad rule making authority to revise our processing rules and to apply the new rules to pending applicants.” Notice at ¶ 14, citing Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989). That broad authority would clearly encompass the relief requested by Davis herein. Furthermore, even the Notice does not contemplate that an auction must be held in every instance. In discussing proposed procedures in cases where only one application is submitted in response to a formally announced auction window, the Notice acknowledges that the FCC plans to then proceed to grant such singleton applications without an auction. See Notice at ¶ 71.

filing window and allow other parties who “sat on their hands” to bid for the channels. The Commission should not treat Davis differently from those applicants who, by mere happenstance, did encounter competition for the channels they applied for. There is no logical reason for treating such parties differently, and Davis urges the Commission to give priority to *all* applicants who have filed applications before the July Cut-Off.

In sum, the Commission is not compelled to hold an auction for singleton applications filed in response to the September 1996 Filing Deadline. Rather, such applications should be accepted for filing by public notice, processed expeditiously, and granted without further delay. Such a course of action would clearly serve the public interest by hastening the provision of new television service to the public, a particularly worthy goal where the digital conversion process is underway and the viewing public in the markets for which Davis has applied will clearly benefit from the introduction of new competition and service as rapidly as possible. The Commission should seize this clear opportunity to advance that fundamental policy objective.

IV.

CONCLUSION

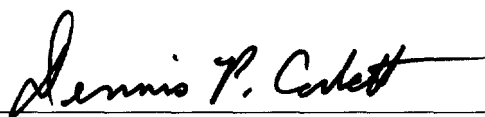
For the reasons stated above, Davis requests that the Commission make clear that it will immediately process all singleton applications for television allotments received by the September 1996 Filing Deadline, without opening another window in the future for competing applications.

Respectfully submitted,

DAVIS TELEVISION DULUTH, LLC

DAVIS TELEVISION TOPEKA, LLC

DAVIS TELEVISION WAUSAU, LLC

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January 26, 1998

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